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No. 94-479

In the Supreme Court of the United States

OCTOBER TERM, 1994

COOL LIGHT COMPANY, INC.,
PETITIONER,

v.

GTE PRODUCTS CORPORATION,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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CIRCUIT COUNCIL
FOR THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 145
EDWIN McCABE

Before
TORRUELLA, SELYA, CYR, BOUDIN, and STAHL, *Circuit Judges*,
CARTER, LAFFITTE and DICLERICO, *District Judges*.

ORDER
ENTERED SEPTEMBER 13, 1994

Complainant, an attorney, has filed a petition for review of Chief Judge Breyer's dismissal of complainant's complaint of judicial misconduct filed under 28 U.S.C. § 372(c) against two district judges.

We will not repeat here the details of the complaint's allegations, which are summarized at greater length in Chielf Judge Breyer's order. In short, the complaint primarily alleges that the first judge, who presided over a civil suit brought by complainant's client and set aside jury verdicts in favor of complainant's client, told members of the jury after the trial that he disagreed with the jury's verdict and that complainant's clients's principal officer had been involved in drug dealing. According to complainant, these remarks demonstrated that the judge had been biased against complainant's client and should have recused himself. The complaint also argued that the remarks themselves were improper, as was the judge's failure to inform counsel that the judge possessed information about the principal's alleged drug involvement. Finally, the complaint suggested that the judge's mere possession of this information may have been improper, on the theory that

there was no innocent reason why the judge should have known about the principal's prior drug indictment.

As for the second named district judge, the complaint alleged that this judge, in denying complainant's motion for relief from judgment under Fed. R. Civ. P. 60(b), had ruled that because complainant's client had already received all the relief to which he would have been entitled had the first judge recused himself — i.e., a new trial before a different judge — there was no need for complainant to conduct discovery concerning the judge's alleged remarks to the jurors. This ruling, complainant objected, prevented complainant from getting to the bottom of the matter.

Chief Judge Breyer dismissed the allegations against the first judge on the ground that, long before the complaint had been filed, this judge had retired from judicial office. A complaint against a retired judge, the chief judge ruled, was ordinarily not cognizable under the Act. Although there might conceivably be exceptions to this rule (for example, where an investigation into the complaint might discover information which could be used to correct undesirable practices in the court generally), the chief judge found that these exceptions did not apply in this matter, since the allegations were limited to misconduct of the retired judge personally.

The chief judge dismissed the complaint's allegations against the second judge on the ground that they were not cognizable under the Act because they were directly related to this judge's ruling denying the Rule 60(b) motion. *See* 28 U.S.C. § 372(c)(3)(A)(ii). The chief judge noted that that ruling was then on appeal.

Since Chief Judge Breyer's dismissal, the first judge has died. And, the court of appeals has affirmed on the merits the second judge's denial of the Rule 60(b) motion (including, implicitly, the second judge's refusal to permit complainant to conduct discovery into the matter).

The petition for review takes issue with Chief Judge Breyer's conclusion that in view of the first judge's retirement from judicial office, no purpose would be served by an inves-

tigation into the complaint's allegations against the first judge. Complainant points to the chief judge's observations that the Act's "purpose is essentially forward-looking," and that "investigating allegations against a former judge who is no longer part of the federal court system *ordinarily* could do nothing to improve the administration of justice in the federal courts" (emphasis supplied by complainant), and argues that "this is not the ordinary case." Although the petition is vague as to why this matter should be thought so extraordinary as to merit investigation, apparently complainant's position is that the complaint's allegations against the first judge are so serious that they simply ought not to go uninvestigated.

We are not persuaded by these arguments. For one thing, the first judge's death obviously moots and renders pointless any inquiry for purely disciplinary purposes.

We recognize, as did Chief Judge Breyer, that in some circumstances inquiry might be warranted for other than disciplinary purposes. Quoting former Chief Judge Campbell's earlier statements in his order dismissing complaint no. 27 (11/21/86), Chief Judge Breyer's order noted that "if a complaint had potential merit, the [Judicial] Council might still wish to make inquiry even after a judge left the bench (particularly in the bankruptcy court), on the possibility that it would discover information which could be used to correct undesirable administrative practices that might still be extant in that court." We agree, however, with Chief Judge Breyer that the instant complaint levelled allegations of misconduct on the part of the first judge *personally* — such as deliberate failure to recuse, improper statements to jurors, and so on — that did not raise any significant possibility of correcting undesirable practices in the court generally. Thus, the goal of correcting undesirable practices in the courts does not provide any basis for inquiry into this complaint despite the judge's retirement and subsequent demise.

As for the complaint's allegations against the second judge, we affirm the chief judge's dismissal for the reasons stated by the chief judge. The correctness of the second judge's ruling

not to permit discovery is a merit-related matter not cognizable under the Act, but rather properly challenged by way of appeal. 28 U.S.C. § 372(c)(3)(A)(ii). Complainant has taken an appeal and lost.

In any event, there is no provision in the Act, or in the Local Rules Governing Complaints of Judicial Misconduct or Disability, permitting a complainant to obtain discovery. To the contrary, the Act and the Rules contemplate that factual investigation into a complaint, where appropriate, shall ordinarily be undertaken by the chief judge, Rule 4(b), by a special investigating committee, Rules 10-13, or by the circuit council, Rules 14(b), 15(b), not by the complainant. *See* commentary to Rule 13 ("these rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely within the discretion of the special committee").

The petition for review is *denied*.

By the Circuit Council:

s/ VINCENT FLANAGAN
Secretary